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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 491.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

LORAINE T. RICKENBERG, Executrix of the Estate of EDWIN W. RICKENBERG, Deceased,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of The Tax Court [R. 14-42] is reported at 11 T. C. 1. The opinion of the Court of Appeals [R. 227-233] is reported at 177 F. 2d 114.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 22, 1949 [R. 233]. By order of Mr. Chief Justice Vinson dated November 15, 1949, the time within which a petition for a writ of certiorari might be filed was extended to and including December 20, 1949 [R. 234]. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

Questions Presented.

Whether an agreement between a husband and a wife residing in California changing the form of ownership of their property from "post-1927" community to tenancy in common was (1) a transfer of an interest in property within the meaning of Section 811(c) and 811(d)(5) of the Internal Revenue Code by the husband when he predeceases the wife; and, (2) if such an agreement constitutes a transfer of an interest in property was such transfer made in contemplation of death within the meaning of Section 811(c); or (3) was it a *bona fide* sale for an adequate and full consideration in money or money's worth within the exception in said section; and (4) if not a *bona fide* sale for an adequate and full consideration in money or money's worth, what was the excess of the fair market value at the time of the death of the decedent of the property otherwise to be included on account of such transaction over the value of the consideration received therefor by the decedent as limited by Section 811(i) of the Code.

Statutes and Regulations Involved.

The relevant statutory provisions and regulations are printed in the Appendix, *infra,* pp. 1 to 6.

Statement.

The facts found by The Tax Court [R. 15-28] so far as they are here pertinent may be summarized as follows: Decedent and Loraine T. Rickenberg, his surviving spouse, were married on July 17, 1913, and lived together

thereafter as husband and wife continuously, mostly within the State of California, until decedent's death on August 23, 1944, at the age of 58 years. All of the property acquired by the decedent was acquired during the marriage. For a number of years after marriage decedent and his wife had practically nothing, merely enough to pay household running expenses. Thereafter and prior to December 2, 1942, the decedent acquired community property having an agreed total value of $345,-696.63 at the date of his death. None of the property was received as compensation for personal services rendered by his wife or was derived from such compensation or from any separate property of hers [R. 17-18].

The decedent was employed as manager of the J. C. Penney Company store at Pomona, California. He had decided to retire on July 1, 1943, and during the summer and fall of 1942 had discussed the matter of his retirement with his insurance counsel relative to the conversion of group insurance held by him under a group insurance plan of the J. C. Penney Company into ordinary life insurance and the acquisition of an annuity [R. 19].

Because of uncertainty as to the manner in which ownership of decedent's property was held the insurance counsel requested advice from a lawyer as to whether the execution by decedent and wife of the agreement involved in this case would subject the property of the decedent to the federal estate and gift tax laws which the insurance counsel had heard were being changed during

the fall of 1942. The lawyer advised that the division of community property between husband and wife thus destroying its community character seemed a desirable step in view of estate tax changes affecting community property to take effect January 1, 1943. The letter so advising was dated November 13, 1942. The changes in the estate tax law were in effect on October 21, 1942. The letter of November 13, 1942, from the lawyer further advised that no gift tax was involved upon a division thereof which takes place prior to January 1, 1943, although possibly any division taking place after that date would be subject to gift tax [R. 20-22]. Acting upon the advice of counsel decedent and his wife executed the agreement on December 2, 1942, reciting therein that all the property accumulated since their marriage was community property although title to the same having been held as joint tenants and in which they agreed to convey all the property both real and personal to themselves as tenants in common [R. 23-25]. The decedent was 56 years of age at the time of the execution of the agreement on December 2, 1942, and was in normal health and not on said date in fear of immediate death [R. 15, 27]. The decedent resigned on July 1, 1943, as manager of the J. C. Penney Co. [R. 19] and died August 23, 1944, from a heart attack [R. 15-16].

The Tax Court found that the agreement of December 2, 1942, constituted a transfer of an interest in property in contemplation of death because the primary motive

was to avoid estate taxes and not to save income taxes or federal gift taxes except that the execution of the instruments took place before January 1, 1943, rather than later in order to escape gift taxes to become effective on that date; and that the agreement dividing the community property into tenancy in common did not constitute a *bona fide* sale for a full and adequate consideration of money or money's worth [R. 27-28]. Accordingly it affirmed the determination of the Commissioner that the value of the property received by the wife by the partition was includible in the gross estate of the decedent. Three judges dissented to the opinion of the majority [R. 36-42].

In its opinion The Tax Court stated that some part of the property may have been acquired before July 29, 1927, and some part of it after said date [R. 34].

The Court of Appeals separated its decision into two parts, holding:

A. That as to community property acquired after July 29, 1927, there was no transfer between the spouses and hence the question of intent was irrelevant [R. 229-230]. The Court of Appeals predicated its decision on the California Civil Code, Section 161a, effective July 29, 1927. *Cf. Fernandez v. Wiener,* 326 U. S. 340, 355. The Court of Appeals pointed out that Congress had not redefined the term "interest" in Section 811 by the amendments as they could have done and that the only change which took place by the agreement was a relinquishment by the husband to the wife of the power of management

and control of her share of the property and he likewise acquired this same power over his half of the property which power is not an interest in property. *United States v. Goodyear,* 99 F. 2d 523; *cf. Fernandez v. Wiener, supra.* The Court further held that Treasury Regulations 105, Section 81.15, applying Section 811(d)(5) to divisions of community property between the spouses into separate property is not a rational interpretation of the statute. It thus became unnecessary for the Court to answer the three remaining questions involved.

B. That as to community property acquired before July 29, 1927, there was a transfer of an interest in property within the meaning of Section 811(c) of the Internal Revenue Code and affirmed The Tax Court's decision as to the pre-1927 community property. The Court's holding was predicated on the principle that as to pre-1927 community property the wife's interest was deemed to be only a mere expectancy and in changing the form of ownership from community to tenancy in common the wife acquired a present interest where she had only an expectancy before and to that extent there was a transfer of an interest by the decedent.

The Court reversed the holding of The Tax Court as to property acquired after July 29, 1927, and remanded the case to The Tax Court for a determination of the amount of the community property involved in the agreement that was acquired by the spouses prior to July 29, 1927.

Argument.

It is submitted that the final appellate jurisdiction vested in the circuit courts of appeals in respect of cases involving the revenue laws subject only to review by the Supreme Court by certiorari by the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. 826, as amended by the Act of February 13, 1925, 43 Stat. 936, and later amendments, should not be superseded by the granting of the writ in this case. The record in the case does not show any reason why the Court should grant the writ.

1. There is of course no conflict of the decision of the court below with any decision of any other court. In fact The Tax Court has reversed itself and in two cases involving identical provisions for gift tax has held that a division of community property into separate property does not constitute a transfer taxable as a gift. *Norman Taurog,* 11 T. C. 1016, appeal dismissed and affirmed by the Court below, reported in 1949 P. H., par. 71,097, and *Edward M. Mills,* March 28, 1949, 12 T. C. 468, pending on appeal to the Court below. In the latter case The Tax Court specifically held that the identically worded gift tax regulation was invalid.

The last pronouncement by a court demonstrating further the unanimity of opinion that such agreements were not transfers is the case of *Bryant Essick v. United States* (Oct. 20, 1949, U. S. D. C., S. D. Calif., E. D.), not yet officially reported but appearing in 1949 C. C. H., par. 10749. In that case the District Court also held that the gift tax regulation identical to the estate tax regulation in question was invalid.

2. The questions presented by this case are not of such importance to the administration of the revenue laws

as to call for the exercise of this Court's power of supervision. In the first place the very sections of the statute which gave rise to the case have now been repealed, effective January 1, 1948. Section 351, Revenue Act of 1948, Chap. 168, 62 Stat. 110. The corresponding gift tax provisions of the Code were repealed by Section 371 of the Revenue Act of 1948 effective on its enactment April 2, 1948. The case obviously has no prospective effect upon the administration of the revenue laws. The question will likely never rise again. The present equitable treatment under the tax laws applying the principles of the community to all married couples is too attractive to soon be discarded.

The petition states there are at least 13 estate tax cases involving the question pending in the courts and before the Treasury Department. The exact number before the courts is not stated. From the statement it is patent that there are less than 13. In view of the repeal of the provisions in question from the Code and the fact that there are at the very most only 13 cases which would be affected by a decision by this Court it is submitted that such a situation does not present exigencies which demand a review by this Court.

There are two other circuits in which the pending cases might fall, namely, the fifth and tenth circuits. When and if one of those courts of appeals decides the issue *contra* it then will be time enough for this Court to resolve the conflict.

The fact that there are 28 gift tax cases pending in the courts and before the Treasury Department which the Government contends will be determined by the final decision in this case should not even be weighed as a

reason by this Court for the granting of the application for the writ. It is at most only cumulative. Except for the amount of money involved nothing is added.

3. It is submitted that importance of parties litigant is not a reason for a granting of a petition for a writ of certiorari. The mere fact that the Government is making the application should not weigh as a reason. The Court should grant the writ only in the interest of the law, its appropriate exposition and enforcement. The importance of the parties or the amount of money involved should not be in any sense controlling. The alleged prospective monetary effect of the decision upon possible gift taxes due in 1948 and succeeding years from the 28 taxpayers in the event they made gifts in 1948 or 1949 or will make gifts in future years is all too problematical to be a reason for the granting of the writ. The writ of certiorari should not be granted to review a case arising under a law which has been repealed because of a new law passed over three and one-half years after the case arose and which has not the slightest bearing upon the issues involved.

4. The Court of Appeals has not failed to follow the applicable decisions of this Court but on the contrary its decision is entirely consonant with the decided cases.

The very essence of the section of the Code sought to be applied is "transfer." The first word of the section is "Transfers." The first word of the section added by the Revenue Act of 1942 which the Government contends made Section 811(c) applicable is "Transfers." Without there being a "transfer" it is obvious the statute does not apply. It is equally patent that an "interest" in property

must be transferred. "Interest" is not defined in the Code. But interests in community property are defined by California statute. Deering's Civil Code of California, Section 161a. See *Washburn v. White* (1900), 176 U. S. 555, for the concept of community property.

The Court of Appeals correctly held that the power of management and control over the property is not an interest in the property pointing out very cogently that if such power of management and control constituted an interest in the property within the framework of Section 811 of the Code then Section 811(e)(2) would have been unnecessary because that would have been includible in the gross estate under Section 811(a). Thus the Court of Appeals points out Congress itself did not consider that upon the death of a decedent owning community property any transfer of an interest in property occurred to the surviving spouse. This Court in *Fernandez v. Wiener, supra,* agreed. That being so an *inter vivos* agreement between the spouses changing the property holding could not constitute a transfer of an interest in property.

A power over property even of disposal is not necessarily an interest in property within the meaning of Section 811 of the Code. *Cf. Helvering v. Safe Deposit Trust Co. of Baltimore, et al.,* 316 U. S. 56, holding that a general testamentary power of appointment over trust property was not such an interest in property as to require its inclusion in his gross estate under Section 811(a) of the Code.

5. The decision of the Court of Appeals that the regulation in question was invalid is not *per se* a reason for the granting of the writ. The wording of Section 811(d)(5)

which the regulation purports to interpret is plain and unambiguous. Its directions are specific. It carries out the pattern of the amendments to the Code then in effect that there must be community action of the spouses. It contemplates solely transfers made by both of them to a third person or persons. It recognized fully the law of community property requiring unity of action of the spouses in transferring property and that a wife cannot act alone in making a transfer of the community or her separate interest therein, nor can the husband transfer his separate community property. *Washburn v. White, supra.*

In Section 811(d)(5) Congress used the conjunctive wording of "* * * a transfer of property held as community property by decedent and surviving spouse * * *." It did not say as the Government contends the wording to mean "a transfer of property held as community property between the decedent and surviving spouse." If Congress had contended the latter it could have said so. It was in the process of amending both the estate tax provisions and gift tax provisions of the Code.

For Congress to have intended the section to mean a division of community property into separate property of the spouses it would have been necessary to have likewise amended Section 811(i) and Section 1002 of the Code to have completed the pattern.

This was not done. Thus said sections would nullify the effect of the Government's contention.

Under Section 811(i) such a division would be limited to the excess of the fair market value at date of death of decedent of the property otherwise to be included in the gross estate over the value of the property received as a result of such transaction. Under Section 1002 there

would be no excess because of equal division and hence no tax.

The regulation attempting to extend the statute to cover situations not within the purview of the statute is thus an amendment to the statute for which no power exists in the administrative body and it is a nullity. *Helvering v. Griffiths,* 318 U. S. 375; *Koshland v. Helvering,* 298 U. S. 441; *Manhattan General Equipment Co. v. Commissioner,* 297 U. S. 129; *Lynch v. Tilden,* 265 U. S. 315.

Section 811(d)(5) and the other sections of the Code pertaining to community property added by the Revenue Act of 1942 were specifically repealed by Section 351 of the Revenue Act of 1948. When that was done of course the regulations ceased to exist. The contention by the Government that the enactment of the Revenue Act of 1948, which specifically repealed the sections of the Code, gave Congressional approval to a regulation which does not exist is absurd.

A fundamental error in the concept of the case on the part of the Government is its failure or refusal to understand and follow the holding of this Court in the case of *Fernandez v. Wiener, supra.* The Court specifically held that there was not a transfer of an interest in property to the surviving spouse resulting from the death of a decedent holding property as community property under Section 811(e)(2) of the Code. It was not a transfer which gave rise to the inclusion in the gross estate of the decedent of the property owned by the surviving spouse in that case, but a cessation of powers and restrictions. Hence, using the Government's own line of argument and following the *Wiener* case, the argument is: Control over the wife's half of the community property was not transferred

to her at the death of the decedent, therefore control over her half of the community property was not transferred to her by the *inter vivos* agreement.

The decision in the *Wiener* case is the complete answer to the Government's argument that the decision of the court below reopens the door to inequality of treatment under the federal estate tax laws as to community property which it contends Congress in 1942 attempted to shut. The decision of the court below is in strict conformity with the decision in the *Wiener* case. If the door to inequality be opened then it was done by the *Wiener* case and not the decision of the court below.

Since the Government contends that Section 811(d)(5) was passed to apply to transfers *inter vivos* between the spouses as Section 811(e)(2) applied to transfers at death of one of the spouses, and, since this Court held that under Section 811(e)(2) a transfer of an interest in property did not occur at the death of a decedent, the assumed premise of the syllogism is not true; therefore, the conclusion is wrong.

Section 811(d)(5) was passed only to apply to transfers of the community property by the community.

There exist additional reasons for denying the writ, for even if it be considered that a transfer of an interest in property occurred the decision of the Court of Appeals would have to be affirmed. The Court of Appeals did not reach the question of intent, that is whether contemplation of death was involved in the case. Since this Court in its last pronouncement on the subject in the case of *Allen v. Trust Co. of Georgia*, 326 U. S. 630, laid down the principles which would be dispositive of this case the Court could only reaffirm that which was said in the *Allen* case

and nothing would be added to the body of the law. In the petition contemplation of death has been assumed. The Court of Appeals very clearly stated that that question was irrelevant. If the determination of control over the wife's half of the property constituted a transfer then it is obvious that decedent was concerned not with what was going to happen to his property at death but what was going to happen to the wife's property. The agreement then was entered into solely to vest in the wife the full legal title of the property which she had always "owned" by operation of law.

If there be any logic to the Government's contention that the agreement constituted a transfer of an interest in property by the decedent then the very terms of the instrument likewise constituted a transfer of an interest in property by the wife to the decedent. Under such circumstances the exception to Section 811(c) as provided therein would be applicable and a bona fide sale for an adequate and full consideration in money or money's worth transpired for obviously the exchanges were of at least equal value.

Finally, if the agreement was not a bona fide sale for an adequate and full consideration in money or money's worth then the amount to be included in the gross estate of the decedent by virtue of the agreement as limited by Section 811(i) of the Code is the excess of the fair market value at the time of the death of decedent of his half of the community property involved in the transaction over the value of the half of the community property belonging to his wife received therefor. At the most the case would have to be remanded to The Tax Court for a determination of the value of the excess.

If it be considered that only control were the subject of the transfer then that the excess of that value over the value of the incorporeal interests received by the decedent as a result of the transaction would have to be determined and it is submitted that such illusory concepts are so nebulous as to defy ascertainment.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES J. MUNZ, JR.,
Attorney for Respondent.

January 12, 1950.

APPENDIX.

INTERNAL REVENUE CODE.

Sec. 811. *Gross Estate.*

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * * * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property

in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

(d) *Revocable Transfers.*—[As amended by Section 402 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.]

* * * * * * * * *

(5) *Transfers of Community Property in Contemplation of Death, etc.*—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

* * * * * * * * *

(i) *Transfers for Insufficient Consideration.*—If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time

of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

The following are the related Gift tax provisions of the Internal Revenue Code in effect during the same period:

Sec. 1000. *Imposition of Tax.*

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

* * * * * * * * *

(d) *Community Property.*—[As added by Section 453 of the Revenue Act of 1942, *supra,* and amended by Section 371 of the Revenue Act of 1948, *supra.*] All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife. This subsection shall be applicable only to gifts made after the calendar year 1942 and on or before the date of the enactment of the Revenue Act of 1948.

(26 U. S. C. 1946 ed., Sec. 1000.)

* * * * * * * * *

Sec. 1002. *Transfer for Less Than Adequate and Full Consideration.*

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Revenue Act of 1948, c. 168, 62 Stat. 110:

Sec. 351. *Repeal of Community Property Estate Tax Amendments.*

(a) Effective with respect to estates of decedents dying after December 31, 1947, sections 811 (d) (5), 811 (e) (2) and 811 (g) (4) of the Internal Revenue Code (relating to community property) are hereby repealed.

* * * * * * * * *

Treasury Regulations 105, Sec. 81.15. (As amended by T. D. 5239, Mar. 10, 1943.) *Transfers during life.*—

* * *

In the case of estates of decedents dying after October 21, 1942, a transfer to a third party or third parties of property held as community property by the decedent and spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered, in accordance with section 811 (d) (5), as added by section 402(a) of the Revenue Act of 1942, for the purposes of this section and sections 81.16 through 81.21, inclusive, to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by

the spouse or derived originally from such compensation or from separate property of the spouse. The same statutory provisions apply in the case of a division of such community property between the decedent and spouse into separate property, and in the case of a transfer of any part of the community property into separate property of such spouse; in such cases, the value of the property which becomes the separate property of such spouse, with the exception stated in the preceding sentence, shall be included in the gross estate of the decedent under section 811 (c) section 811 (d), if the other conditions of taxability under such sections exist. * * *

* * * * * * * * *

Deering, Civil Code of California (1949):

§161a. [*Interests in community property.*] The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

* * * * * * * * *

§172. [*Management of community personal property: Limitations: Consent of wife.*] The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furni-

ture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

§172a. [*Management of community real property: Joinder of wife in conveyance: Presumption of validity: Action to avoid instrument: Limitations.*] The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.